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Supreme Court of the United States

October Term, 1978

No. 78-1679

CANAL BARGE COMPANY, INC.,
Petitioner,

vs.

PPG INDUSTRIES, INC. and
ASHLAND OIL COMPANY—
THOMAS PETROLEUM TRANSIT DIVISION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Statement of the Case

To fully understand the present posture of this action, it is necessary to briefly review the procedural history of this case, a case which has been twice tried before the United States District Court, Western District of Pennsylvania, and which has twice received the review of the Court of Appeals, Third Circuit.

This action is a civil action based on diversity of citizenship and jurisdictional amount which was brought by PPG In-

dustries, Inc. (PPG) to recover for contamination of a water soluble anti-freeze cargo on a carriage of its goods on the inland waterways of the United States by Ashland Oil Company—Thomas Petroleum Transit Division (Ashland) and the Canal Barge Company, Inc. (Canal) from Beaumont, Texas, to St. Paul, Minnesota. Upon arrival the cargo of anti-freeze was found contaminated.

Initially, a jury trial was held before District Judge Herbert P. Sorg on April 24 and 25, 1974. At that time, testimony was presented regarding PPG's attempted avoidance of the one year Statute of Limitations contained within the U.S. Carriage of Goods by Sea Act (COGSA), 26 USCA § 1301 *et seq.* (1970), which had been specifically incorporated within the PPG—Ashland Transportation Agreement. The defense of the expiration of the one year Statute of Limitations had been properly raised as by both Ashland and Canal, as a bar to the claim of PPG.

After the taking of testimony, the District Court directed a verdict in favor of both Ashland and Canal based on the Statute of Limitations defense. This decision was appealed by PPG to the United States Court of Appeals, Third Circuit.

Thereafter, on December 16, 1975, the Third Circuit Court of Appeals, per Circuit Judge Van Dusen, affirmed the determination of Judge Sorg as to Ashland, but reversed as to Canal. ***PPG Industries, Inc. v. Ashland Oil Company—Thomas Petroleum Transit Division v. Canal Barge Company, Inc.***, 527 F2d 502 (3rd Cir. 1975).

Thereafter, when this matter was called for trial by District Court Judge Hurbert I. Teitelbaum, pursuant to the remand order of the Third Circuit Court of Appeals, argument was made by counsel for Canal that despite the affirmance of the directed verdict of Judge Sorg in favor of Ashland by the Court of Appeals, Third Circuit, Ashland remained a party to

this lawsuit on the basis of the Crossclaim of Canal against Ashland for contribution and/or indemnity, this claim being based on the theory that Ashland had negligently supplied an unseaworthy barge for transportation of the liquid cargo involved in this matter.

Ashland opposed such a position, arguing that a review of the Order of District Judge Sorg, and the opinion and order of the Court of Appeals, Third Circuit, affirming the order of Judge Sorg as to Ashland, relieved Ashland as a party to the second action between PPG and Canal.

After receipt of briefs and oral argument, District Judge Teitelbaum ruled that Ashland remained a party to this action based on the assertions contained in the Crossclaim of Canal, despite the opinion and order of the Court of Appeals and its ruling that there could be no direct action by PPG against Ashland.

Thereafter, this matter proceeded to trial with Ashland's only real involvement being the claim of Canal that Ashland allegedly provided an unseaworthy barge for use in transportation of the liquid cargo.

After the completion of testimony, District Judge Teitelbaum removed the issue of unseaworthiness of the barge in question from jury determination. This decision was based on the failure of Canal to place any testimony on the record to substantiate its position that a "single skin" barge, as provided for this voyage by Ashland, was "unseaworthy" and that a "double skin" barge should have been utilized.

After the granting of PPG's Motion for Judgment *NOV*, an appeal was lodged for a second time with the Court of Appeals, Third Circuit, this appeal being perfected by Canal. In an Opinion filed December 29, 1978, the Court of Appeals, Third Circuit, *per* Circuit Judge Weis, affirmed the decision of the District Court.

REASONS FOR DENYING THE WRIT

Rule 19(1)(b) suggests that the Supreme Court of the United States will grant a *writ of certiorari* to review a matter previously decided by a Court of Appeals, *inter alia,* when the Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals. While Rule 19(1)(b) outlines other situations when the granting of a *writ of certiorari* is appropriate, this Respondent does not believe those enumerated instances can be arguably applied to this case.

This Respondent suggests that insofar as its involvement in this matter is concerned, the decision of the United States District Court, Western District of Pennsylvania, and United States Court of Appeals, Third Circuit is consistent with decisions of other Court of Appeals and consistent with the decisions and rules of law published by this Honorable Court.

I. The determination of the District Court Judge to remove from jury consideration the issue of the unseaworthiness of a single skin versus a double skin barge was proper and consistent with applicable case law.

As pointed out above, the involvement of Ashland in the second trial of this matter before the District Court was limited to the issue of whether the single skin barge provided by Ashland was seaworthy. The issue was raised in a Crossclaim filed by Canal against Ashland.

Canal asserted a theory in support of its Crossclaim against Ashland to the effect that a water soluble cargo such as the one being transported in this case, ethylene glycol, should be carried in a "double skin" barge. The barge which was used to carry the involved cargo was of a "single skin" variety.

After the close of testimony, District Judge withdrew from jury consideration whether the use of a single skin barge, as opposed to a double skin, for the purposes at hand rendered that barge unseaworthy.

It is well-established that the issue of unseaworthiness should be submitted to a jury only if fair-minded men, viewing all the facts and inferences to be drawn from the facts can differ over whether the ship and its gear are reasonably fit for service. *Greene v. Vantage Steamship Corporation,* 466 F2d 159 (4th Cir. 1972).

A review of the entire testimony presented by Canal, especially that of its expert, Mr. Rubin N. Cioll, shows that the trial court properly removed the "single v. double skin" issue from jury consideration.

In summary, it was the testimony of Canal's own expert that single skin barges are presently used all of the time on the inland rivers of the United States for transportation of material such as ethylene glycol, the cargo in question here. Mr. Cioll also stated that transportation of this substance in a single skin barge was safe from a "hazard" standpoint, including explosions, etc. Canal's expert also stated that single skin barges routinely and safely travel the inland rivers of this country with cargos such as ethylene glycol, without encountering any difficulties.

The expert said that to his knowledge double-skinned barges had first been built about six years before the topping incident and were used to transport lubrication oil. Also, Mr. Cioll acknowledged the very important fact that the U.S. Coast Guard regulations which control the types of barges utilized under certain circumstances, specifically sanctions the use of a single skin barge under the situations presented in this case.

In addition, in response to a question posed by the Trial Judge, Mr. Cioll responded that single skin barges were "safe" for the transportation of ethylene glycol or anti-freeze.

Also, it was the testimony of the marine superintendent for Canal that although Canal had some double-skinned barges in 1971, most of its equipment was of the single-skinned variety. He said that the Coast Guard had not issued any pertinent regulations, and at the time of the incident, custom was beginning to change in favor of using double-skinned vessels. When double-skinned barges were not available, Canal would use single skin vessels to carry soluble cargo. The witness also stated that Canal would never furnish an unseaworthy barge.

The appropriateness of the action of the District Court Judge in withdrawing this issue from jury consideration was thoroughly reviewed by the Court of Appeals, Third Circuit. In the Opinion affirming the actions and decisions of the District Court Judge, the majority of the Court notes on the seaworthiness issue:

> "Generally, the issue of unseaworthiness is one of fact and is submitted to the jury. *Luckenbach v. McCahan Sugar Co.*, 248 U.S. 139, 145 (1942). *The Wildcroft*, 201 U.S. 378, 287 (1906); *The Carib Prince*, 170 U.S. 655, 658 (1898). Here, however, there was no dispute about the facts. Essentially, what the Defendant was asserting was a new development in construction which had not come into common use in the industry. It [illegible] not such an innovation it had to be adopted by all shippers immediately, making the older barges obsolete for transporting this particular cargo. Compare the T. J. Hooper, 60 F. 2d 737, 740 (2d Cir.), cert. denied sub nom. *Eastern Transportation Co. v. Northern Barge Corp.* 287 U.S. 662 (1932), with *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193, 201 (5th Cir.), cert. denied, 389 U.S. 828 (1967). Nor was it shown that scraping the barge and holding the bottom was reasonably to be expected in a voyage on the Mississippi. Under the circumstance of this case, the trial judge did not err in withdrawing the design issue from the jury."

Thus, from a review of the evidence presented by Canal, it is obvious that fair-minded men could not differ on the "seaworthiness" issue, and therefore, the District Court Judge properly withdrew this issue from jury consideration.

CONCLUSION

Thus, it is clear that the Court of Appeals applied the proper standard in its review of the action of the District Judge in withdrawing the issue of unseaworthiness of the subject barge from jury consideration. The standard utilized by the District Judge and Court of Appeals was in conformance with the decisions and dictates of applicable federal law. For this reason, the Petitioner has asserted no grounds for the granting of a *Writ of Certiorari.*

Respectfully submitted,

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